Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Luba Slanina,

complainant,

and

Air Canada Pilots Association,

respondent,

and

Air Canada,

employer.

Board File: 28610-C
Neutral Citation: 2011 CIRB **584**
April 29, 2011

A panel of the Canada Industrial Relations Board (the Board), composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. André Lecavalier and John Bowman, Members, considered the above-noted complaint.

These reasons for decision were written by Mr. John Bowman, Member.

I–Introduction

[1] Mr. Luba Slanina (the complainant) is a pilot employed by Air Canada (the employer). In January 2011, he asked his union, the Air Canada Pilots Association (ACPA or the union), to file

a grievance on his behalf regarding his position on the seniority list. When the union did not file the requested grievance, the complainant filed a complaint with the Board on February 25, 2011, alleging that the union had breached its duty of fair representation under section 37 of the *Canada Labour Code* (*Part I Industrial Relations*) (the *Code*), by acting in an arbitrary and discriminatory manner when it failed to file a grievance regarding his seniority entitlement.

[2] The question before the Board is whether the complainant has made out a *prima facie* case that the union acted in a manner that breached its duty of fair representation under the *Code*, when it failed to file a grievance regarding the complainant's seniority entitlement.

II–Overview

[3] Since the complaint involves the issue of seniority entitlement, it is important to provide some background regarding pilot seniority at Air Canada. The merger of Air Canada and Canada Airlines International Ltd (CAIL) in January 2000 triggered a lengthy and controversial process to determine the relative seniority of the pilots from the two operations, who were now being merged into one seniority list. Considerable litigation ensued, which will not be set out in any detail here, but is summarized in *Air Canada*, 2006 CIRB 349 (*Air Canada*, RD 349), application for reconsideration dismissed in *Air Canada*, 2006 CIRB 360, application for judicial review dismissed (*A.C.P.A.* v. *A.L.P.A.* (No. A-144-06), 2007 FCA 241; and 154 CLRBR (2d) 73), leave to appeal to the Supreme Court of Canada denied in *Air Canada Pilots Association v. Air Line Pilots Association et al.*, no. 32243, November 29, 2007 (S.C.C.).

[4] The seniority entitlement for Air Canada pilots was ultimately determined through a process of binding arbitration before Arbitrator Brian Keller. All parties agreed to be bound by the decision of the arbitrator. Not surprisingly, given the difficult and complicated nature of these issues, some pilots were unhappy with the outcome of the process. There have been various efforts to overturn aspects of the Keller award that were seen as unfair to certain groups of pilots. In *Rob McInnis*, 2009 CIRB 454, the Board cautioned the union regarding its efforts to alter provisions of the Keller award through the collective bargaining process. After the union advised the membership that it

would not continue to pursue these issues in collective bargaining, individual pilots began asking the union to file grievances on the same issue.

[5] In 2009, the Canada Human Rights Tribunal (the CHRT) issued a decision on the issue of mandatory retirement for Air Canada pilots. The collective agreement between the parties requires pilots to retire at age 60. The CHRT decision found this to be discriminatory. In 2010, the CHRT issued a further decision, reinstating two pilots who had been forced to retire at age 60. Further litigation has occurred on the issue both before the courts and the CHRT. However, the issue has not been ultimately resolved and the final effect of the CHRT decision on Air Canada pilots remains uncertain. In September 2010, a member of the union filed a section 37 duty of fair representation complaint with the Board, after the union refused to pursue his grievance on seniority entitlement. That member alleged that the decision of the CHRT on mandatory retirement was a significant event that would justify revisiting the seniority award of Arbitrator Keller. The Board dismissed the complaint in *Russ Cooper*, 2010 CIRB 553 (*Russ Cooper*, RD 553), which was upheld on reconsideration in *Russ Cooper*, 2011 CIRB LD 2487.

[6] Having briefly reviewed the history of the pilot seniority issue at Air Canada, we will turn to the specific facts of this case. The complainant sent an email to the union on January 10, 2011, in which he stated:

> Could you please contact me at your convenience today so I know how to proceed with the grievance regarding the loss of my seniority and reinstatement of former ACPA members that retired at age 60?
>
> The issue has come to the point where I must take action if the Association or Company cannot.

[7] It is evident from the documents supplied by the complainant that he and various union officers exchanged a number of emails during January and early February 2011 regarding the issue of his seniority. The complainant made it clear that he wished to file a grievance due to the CHRT rulings on mandatory retirement, which resulted in the reinstatement of two pilots who had been forcibly retired. The complainant viewed this as a "significant event" as that term was used in *Air Canada*, RD 349, which would justify revisiting the Keller arbitration award. It is clear, from reply emails from the union to the complainant, that ACPA disagreed with this assessment. In various emails, the union representative indicated that the CHRT had the authority to make the decisions that it did,

including its decision to reinstate the two pilots. The union also indicated that the issues raised by the complainant were also raised in the case of *Russ Cooper*, RD 553, and that the issue of whether the CHRT decision was a significant event was determined by the Board in that case.

[8] The complainant continued to email various union representatives asking them to file a grievance regarding his seniority ranking. While there is nothing on file indicating that the union expressly refused to file a grievance, it is clear from some of the emails that the union did not agree with the complainant's position. No grievance had been filed at the time this complaint was made.

III–Analysis

[9] Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. It is further noted that the complainant did not request a hearing in this matter. Having reviewed the materials provided by the complainant, the Board is satisfied that the documentation before it is sufficient for it to decide this matter without an oral hearing.

[10] The complainant alleges that the union breached section 37 of the *Code* because it acted in an arbitrary and discriminatory manner when it refused to file a grievance regarding his seniority entitlement. He alleges that the union acted arbitrarily by not pursuing his grievance given the 2010 decision of the CHRT, which he interprets as a "significant event" that would enable the union to challenge the Keller seniority arbitration award. The complainant submits that the union is acting in a discriminatory manner by allowing the pilots who were successful at the CHRT to be reinstated in contravention of the collective agreement, and is giving such pilots preferential treatment in a form of reverse discrimination. As a remedy for the alleged breach of the *Code*, the complainant seeks an order requiring the union to pay for legal counsel of his choice to take his grievance to arbitration.

[11] As noted previously, a very similar case has already been decided by this Board in *Russ Cooper*, RD 553. In that case, the Board noted that the complainant was, in effect, asking the union to take a grievance to arbitration with the intended result of overturning some aspects of a previous arbitration award (the Keller award). The same thing is true in the case now before the Board. In

Russ Cooper, RD 553, the Board noted that it is not a breach of the duty of fair representation for a union to refuse to appeal an arbitration award, because that decision is not within the scope of a union's duty of fair representation under section 37 of the *Code*. That decision referred to the following quote from *Gordon Newell* (1987), 69 di 119 (CLRB no. 623):

> In the Board's judgement, a refusal or failure to seek judicial review is not of itself a violation of section 136.1 [now section 37 of the *Code*] in a circumstance such as this. The section specifies that the duty of fair representation applies to persons "with respect to their rights under the collective agreement that is applicable to them." There is no evidence before the Board that the collective agreement between CALPA and Air Canada at any time material to these proceedings gave anybody the right to have an arbitration decision affecting him or her taken to the Court for judicial review. Mr. Newell thus had no right under section 136.1 to have the arbitrator's decision "appealed," as he put it.

[12] The paragraph in *Russ Cooper*, RD 553 that followed the quote noted above is also relevant to this case. The Board stated:

> [12] While the complainant is seeking to challenge the Keller award through filing a new grievance, rather than through the courts, the principle noted above still applies. A union does not have any obligation under section 37 of the *Code* to appeal an arbitrator's award, unless there are specific provisions in the relevant collective agreement that give a bargaining unit member the right to require such an appeal. No such provisions were brought to the Board's attention regarding the ACPA/Air Canada collective agreement. In fact, the intent of the arbitration process, as noted in the union's June 18, 2010 email to the complainant, is that the parties involved accept the outcome as a final and binding settlement of the issues in dispute. For this additional reason, the Board finds that the union did not breach its duty of fair representation when it refused to file a grievance on the complainant's behalf which would have the clear effect of challenging certain provisions of the Keller arbitration award.

[13] In this case, the complainant was seeking to have the union file a grievance with the intent of overturning some aspects of the Keller arbitration award. Like the complainant in *Russ Cooper*, RD 553, the complainant in this case is also seeking to use the decisions of the CHRT on mandatory retirement as a basis for revisiting the Keller arbitration award. As in *Russ Cooper*, RD 553, this panel of the Board does not find that the union was under any obligation to file a grievance that would challenge the Keller award, and that the union's decision not to file the requested grievance was in keeping with the obligation of all the parties to that award to accept it as a final and binding resolution of the pilot seniority issue arising from the CAIL/Air Canada merger. For that reason alone, we would dismiss the complaint.

[14] The Board further notes that the complainant in this case asked the union to pursue a challenge to the Keller award on the basis that the CHRT decision on mandatory retirement was a "significant event" as contemplated by the Board in *Air Canada*, RD 349. In order to understand the reference to "significant event", we refer to the following paragraphs from that decision:

> [107] What the dismissal means is that ACPA and Air Canada, acting alone, cannot change the rankings of the former Canadian pilots on the seniority list because of a perceived unfairness on the part of some of the other pilots in the bargaining unit. It means that the Keller award, which sets the post-merger seniority rankings for the pilots at Air Canada, is final and binding. It also means that the seniority integration list, now in the pilots' collective agreement, will continue to determine the seniority-related rights and benefits that each pilot in the bargaining unit is entitled to.
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> [108] The dismissal does not mean, however, that ACPA and Air Canada, acting on their own, will never be able to justify addressing the issue of pilot seniority in the future. Just as the 2000 merger necessitated changes to existing seniority lists, so may some new, equally significant, corporate initiative or event occur that would necessitate making changes to the present pilot seniority list. Given the dynamic nature of the airline industry, it is not inconceivable that an event of the magnitude of a merger, for example, might occur sometime in the future. Should that prove to be the case, ACPA and Air Canada, parties to the pilots' collective agreement, would be responsible for negotiating the required changes to the pilots' seniority list. Those negotiations would have to be conducted within the confines and the spirit of the *Code*.
>
> (...)
>
> [111] The pilot seniority list, the result of the Keller arbitration process, is now final and binding on ALPA, ACPA and Air Canada. ACPA and Air Canada, acting alone, cannot change that list because some pilots in the bargaining unit are dissatisfied with it. The seniority list, however, is not etched in stone. Were a significant corporate initiative or event to occur that necessitated making changes to the pilots' seniority list, then ACPA and Air Canada, the parties to the pilots' collective agreement, would be responsible for negotiating the required modifications.

[15] While the Board in RD 349 did not conclusively determine what would be a "significant event" that could trigger a review of the Keller arbitration award, clearly it was looking at an event of the magnitude of the Air Canada/CAIL merger, which could include another large corporate merger sometime in the future. The effect of the CHRT decision regarding mandatory retirement on existing pilots is yet to be decided. These issues remain before the CHRT and the Courts. At this point, a very small number of pilots who had been forcibly retired have been reinstated. There is clearly no "significant event" that has occurred that would impact the existing pilots at Air Canada in a comparable manner to the CAIL/Air Canada merger. It is therefore inconsistent with the Board's finding in *Air Canada*, RD 349 to suggest that the union was somehow required to challenge the Keller arbitration award on the basis that the CHRT ruling on mandatory retirement was a

"significant event" as defined in that decision. For this additional reason, the Board would dismiss the complaint.

IV–Conclusion

[16] The Board finds that the complainant has not made out a *prima facie* case against the union. The union did not act in an arbitrary, bad faith or discriminatory manner when it decided not to file a grievance regarding the complainant's seniority entitlement. The complaint under section 37 of the *Code* is dismissed.

[17] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

André Lecavalier
Member

John Bowman
Member